## Kevin Peter Schmider v Nadja Geb Schmider Poignee & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCVC-158–07 OF 2017
AHMAD KAMAL J
31 JULY 2019

*Succession — Will — Validity — Two conflicting wills — Validity of second will — Whether deceased had testamentary capacity — Whether there was due execution of will — Whether there were suspicious circumstances surrounding making of will and its content — Wills Act 1959 s 5*

*Evidence — Admissibility — Admissibility of affidavit and expert report as exhibit — Whether maker of expert report and affidavit present in court — Whether affidavit proved under s 73(a) of the Evidence Act 1950 — Whether expert report and affidavit admissible — Evidence Act 1950 s 73(a)*

The present action was in relation of two wills dated 29 October 2014 ('the first will') and 18 August 2015 ('the second will') respectively, purportedly executed by the deceased for the benefits of his daughters and son. The plaintiff's case was that, via the second will, the deceased had appointed the plaintiff as the executor of his estate whereby all the inheritance were bequeathed to the plaintiff. In contradiction to the plaintiff's case, the defendants averred that, via the first will, the deceased had appointed the defendants as joint executor of his estate whereby all the inheritance were bequeathed to the defendants. The plaintiff claimed for a declaration: (a) that the first will is revoked; (b) that the grant of probate dated 29 March 2016 is revoked; (c) that the second will is enforced and executed; and (d) that the share transfer transaction from the deceased to the defendants is void. On the other hand, the defendants counterclaimed, inter alia, for the following order: (i) that the court shall pronounce against the validity of the second will; (ii) that the court shall pronounce in solemn form for the true last will and testament of deceased dated 29 October 2014; (iii) a declaration that the grant of probate dated 29 March 2016 for the first will is properly issued; (iv) an order that the registrar of the High Court do return the original grant of probate dated 29 March 2016 to the defendants for the due administration of the estate; (v) that the plaintiff do pay the defendants costs of the counterclaim; (vi) that parties are at liberty to apply; and (vii) such further order and/or relief that may be deemed fit and appropriate to this honorable court. The issues to be determined were: (1) whether the deceased had testamentary capacity at the time when he made the second will; (2) whether there was due execution of the second will; and (3) whether there were suspicious circumstances surrounding

A the making of the alleged second will and its content.

**Held**, dismissing the plaintiff's claim and allowing the defendants' counterclaim with costs of RM35,000 subject to payment of an allocator fees:

B (1) Since the second will was being challenged, the burden was on the plaintiff to prove testamentary capacity of the deceased and the due execution of the second will and there were no suspicious circumstances surrounding the making of the will (see para 43).

C (2) Based on the facts of the case, the testimony of the plaintiff and documents submitted in court, it was evident that the deceased had no capacity to make the second will. Evidence showed that the plaintiff had no knowledge of what took place at the time the purported second will was made, hence, the plaintiff was not in a position to discharge the burden that rested on him to prove testamentary capacity of the deceased and the due execution of the purported second will. Further, there was no witness to prove that the deceased knew and approved the content of the purported second will (see paras 48, 51, 56, 59 & 65).

E (3) The plaintiff had failed to produce evidence to show that there was due execution of the second will. The attendance of the maker of the purported second will and the two attesting witnesses was mandatory and the failure of all to attend court rendered the purported second will 'not worth the paper it is written on'. On the other hand, the defendants had produced two witnesses who were with the deceased throughout the day on 18 August 2015. Both the witnesses testified that on 18 August 2015, the deceased had no visitors and did not sign the purported second will. As their evidence was not challenged, the court held that the deceased did not sign the second will on 18 August 2015 (see paras 66, 74–76 & 80).

G (4) The plaintiff relied on the expert report by Dr Michael Franz ('IDP1') and supplementary affidavits of the plaintiff's witnesses ('IDP2') to assist him in the dispel of the burden. The court held that IDP1 ought not to be converted as an exhibit as the maker of IDP1 was not present in court. In respect of IDP2, since the two affidavits were not strictly proved as required by s 73(a) of the Evidence Act 1950 thereby depriving the defendants the opportunity to test the authenticity of their contents, such exhibits remained inadmissible. In addition, converting IDP2 into an exhibit so that it can assist the plaintiff in the discharge of his burden of proof would be contrary to s 5 of the Wills Act 1959 which had been judicially interpreted by the courts to make it mandatory for the attesting witnesses to be present in the court and give evidence on the due execution of the purported second will (see paras 81, 85 & 92–93).

(5) The plaintiff had failed to discharge the burden of dispelling suspicious circumstances. The plaintiff failed to dispel suspicious circumstances raised by the first defendant and such failure was fatal to the plaintiff's case (see paras 94 & 96–97).

(6) On the issue of the shares of the deceased, it was already registered in the name of the two defendants. Therefore, they did not form a part of the estate of the deceased and the plaintiff had no locus standi or legal capacity to impugn the transfer of shares (see paras 98–99).

**[Bahasa Malaysia summary**

Tindakan ini adalah berkaitan dengan dua wasiat yang bertarikh 29 Oktober 2014 ('wasiat pertama') dan 18 Ogos 2015 ('wasiat kedua') masing-masing, yang dikatakan disempurnakan oleh si mati untuk faedah anak perempuan dan lelaki beliau. Kes plaintif adalah bahawa, melalui wasiat kedua, si mati telah melantik plaintif sebagai pentadbir harta pusaka beliau di mana kesemuanya diwariskan kepada plaintif. Bertentangan dengan kes plaintif, defendan menyatakan bahawa, melalui wasiat pertama, si mati telah melantik defendan sebagai pentadbir bersama harta pusaka beliau di mana kesemuanya diwariskan kepada defendan. Plaintif menuntut untuk deklarasi: (a) bahawa wasiat pertama dibatalkan; (b) bahawa perintah probet bertarikh 29 Mac 2016 dibatalkan; (c) bahawa wasiat kedua dikuatkuasakan dan dilaksanakan; dan (d) bahawa transaksi pemindahan saham dari si mati kepada defendan adalah tidak sah. Sebaliknya, defendan membuat tuntutan balas, antara lain, untuk perintah yang berikut: (i) bahawa mahkamah akan membuat pengisytiharan terhadap kesahan wasiat kedua; (ii) bahawa mahkamah hendaklah melafazkan dalam cara yang sahih untuk wasiat dan bukti terakhir si mati adalah bertarikh 29 Oktober 2014; (iii) perisytiharan bahawa perintah probet bertarikh 29 Mac 2016 untuk wasiat pertama diberikan dengan betul; (iv) perintah bahawa pendaftar Mahkamah Tinggi akan memulangkan geran asal probet yang bertarikh 29 Mac 2016 kepada defendan bagi pentadbiran harta pusaka tersebut; (v) bahawa plaintif membayar kepada defendan kos tuntutan balas tersebut; (vi) pihak bebas untuk memohon; dan (vii) apa-apa perintah dan/atau relif lanjut yang difikirkan patut dan sesuai oleh mahkamah yang mulia ini. Isu-isu yang perlu diputuskan adalah: (1) sama ada si mati mempunyai keupayaan memberi keterangan pada masa dia membuat wasiat kedua; (2) sama ada terdapat pelaksanaan wasiat kedua; dan (3) adakah terdapat keadaan yang mencurigakan terhadap apabila wasiat yang dikatakan kedua dan kandungannya dibuat.

**Diputuskan**, menolak tuntutan plaintif dan membenarkan tuntutan balas defendan dengan kos sebanyak RM35,000 tertakluk kepada pembayaran fi alokatur:

(1) Oleh kerana wasiat kedua telah dicabar, beban pembuktian alalah pada plaintif untuk membuktikan kapasiti wasiat si mati dan pelaksanaan

yang sepatutnya oleh wasiat kedua dan tidak ada keadaan yang mencurigakan apabila wasiat dibuat (lihat perenggan 43).

(2) Berdasarkan fakta kes, keterangan plaintif dan dokumen yang dikemukakan di mahkamah, jelas bahawa si mati tidak mempunyai keupayaan untuk membuat wasiat kedua. Bukti menunjukkan bahawa plaintif tidak mengetahui apa yang berlaku pada masa wasiat kedua dibuat, maka, plaintif tidak berada dalam posisi bagi melepaskan beban pembuktian beliau untuk membuktikan keupayaan wasiat si mati dan pelaksanaan yang sepatutnya terhadap wasiat kedua. Selanjutnya, tidak ada saksi untuk membuktikan bahawa si mati mengetahui dan meluluskan kandungan wasiat kedua (lihat perenggan 48, 51, 56, 59 & 65).

(3) Plaintif telah gagal mengemukakan bukti untuk menunjukkan bahawa terdapat pelaksanaan wasiat kedua. Kehadiran pembuat wasiat kedua dan dua saksi adalah wajib dan kegagalan mereka untuk hadir ke mahkamah telah menyebabkan wasiat kedua 'tidak bernilai diatas kertas yang ditulis'. Sebaliknya, defendan telah membawa dua saksi yang bersama dengan si mati sepanjang hari pada 18 Ogos 2015. Kedua-dua saksi memberi keterangan bahawa pada 18 Ogos 2015, si mati tidak mempunyai pelawat dan tidak menandatangani wasiat kedua. Oleh kerana keterangan mereka tidak dicabar, mahkamah berpendapat bahawa si mati tidak menandatangani wasiat kedua pada 18 Ogos 2015 (lihat perenggan 66, 74–76 & 80).

(4) Plaintif bergantung kepada laporan pakar oleh Dr Michael Franz ('IDP1') dan afidavit tambahan saksi-saksi plaintif ('IDP2') untuk membantunya dalam melepaskan beban pembuktian. Mahkamah berpendapat bahawa IDP1 tidak sepatutnya ditukarkan sebagai ekshibit kerana pembuat IDP1 tidak hadir ke mahkamah. Berhubung dengan IDP2, kerana kedua-dua afidavit itu tidak dibuktikan dengan kukuh sebagaimana yang dikehendaki oleh s 73(a) Akta Keterangan 1950 dengan itu mengurangkan peluang defendan untuk menguji ketulenan kandungannya, ekshibit tersebut tetap tidak dapat diterima. Di samping itu, penukaran IDP2 menjadi ekshibit supaya ia dapat membantu plaintif dalam melepaskan beban pembuktiannya adalah bertentangan dengan s 5 Akta Wasiat 1959 yang telah ditafsirkan secara adil oleh mahkamah untuk menjadikannya mandatori bagi saksi untuk hadir ke mahkamah dan memberi keterangan mengenai pelaksanaan yang sepatutnya terhadap wasiat kedua (lihat perenggan 81, 85 & 92–93).

(5) Plaintif telah gagal melepaskan beban pembuktian terhadap keadaan yang mencurigakan. Plaintif gagal untuk menghilangkan keadaan yang mencurigakan yang dibangkitkan oleh defendan pertama dan kegagalan tersebut adalah membawa padah kepada kes plaintif (lihat perenggan 94 & 96–97).

(6) Mengenai pengeluaran saham si mati, ia telah didaftarkan atas nama kedua-dua defendan tersebut. Oleh itu, mereka tidak membentuk sebahagian harta pusaka si mati dan plaintif tidak mempunyai lokus standi atau keupayaan undang-undang untuk mengesyaki pemindahan saham tersebut (lihat perenggan 98–99).]

**Notes**

For cases on admissibility, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 97–174.

For cases on validity, see 11(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 3180–3188.

**Cases referred to**

*Ch'ng Kheng Phong v Chung Keng Huat & Ors* [2011] 8 MLJ 32, HC (refd)

*Chin Foh Bhd & Anor v Kwan Yun Hong @ Kuan Onn Hing & Ors* [2012] 9 MLJ 854; [2012] MLJU 462, HC (refd)

*Dr K Shanmuganathan v Periasamy s/o Sithambaran Pillai* [1993] MLJU 91; [1993] 4 MLRH 95, HC (refd)

*Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, FC (refd)

*Kek Siong Uteh v Aw Siew Keon* [2016] 4 MLJ 356; [2017] 3 MLRA 23, CA (refd)

*Khaw Cheng Poon & Ors v Khaw Cheng Bok & Ors and another appeal* [2005] 6 MLJ 540; [2004] 2 MLRA 687, CA (refd)

*Lim Kang Hai & Ors v Lim Chik Lock* [2013] MLJU 614; [2013] MLRHU 1, HC (refd)

*Ong Cheng Guan (menyaman bagi pihak dirinya dan bagi pihak benefisiari-benefisiari kepada mendiang Ong Eng Bee) & Anor v Ong Eng Hock & Anor* [2016] MLJU 1703; [2016] MLRAU 1, CA (refd)

*Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465; [1997] 2 MLRA 202, FC (refd)

*RNS Oil and Gas Sdn Bhd v Norhayati binti Ahmad Kamal* [2016] MLJU 934, HC (refd)

*Soo Hong & Leong Kew Moi & Ors v United Malayan Banking Corp Bhd & Anor* [1997] 1 MLJ 690; [1996] 2 MLRA 547, CA (refd)

*Tho Yow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ 97; [2002] 2 MLRA 213, CA (refd)

*Tiow Weng Theong v Melawangi Sdn Bhd* [2018] 6 MLJ 761; [2018] 6 MLRA 52, CA (refd)

*Wong Chop Saow v Public Prosecutor* [1965] 1 MLJ 247 (refd)

**Legislation referred to**

Evidence Act 1950 ss 73(a), 114(g)

Rules of Court 2012 O 34 r 2, O 41 rr 7, 8, O 72 r 2

A Wills Act 1959 s 5

*Azwan Abdul Wahab (Azri Nadiah with him) (Rahayu Partnership) for the plaintiff.*
*Reginald Vallipuram (Reginald Vallipuram & Co) for the defendants.*

B

**Ahmad Kamal J:**

INTRODUCTION

C **[1]** The plaintiff's claim against the defendants is for:

(a) for a declaration:

(i) that the first will made by Peter Schmider dated 29 October 2014 is revoked;

D

(ii) that the grant of probate dated 29 March 2016 is revoked;

(iii) that the second will made by Peter Schmider dated 18 August 2015 is enforced and executed; and

E

(iv) that the share transfer transaction from Peter Schmider to the defendants is void;

(b) an order against the defendants:

(i) an injunction order against the defendants' share transaction; and

F

(ii) removing the defendants' name as the company's director of a company known as Tamawira Enterprise Sdn Bhd due to elements of losses.

G **[2]** The defendants counterclaim against the plaintiff for the following order:

(a) that the court shall pronounce against the validity of the alleged will dated 18 August 2015;

H

(b) that the court shall pronounce in solemn form for the true last will and testament of deceased dated 29 October 2014;

(c) a declaration that the grant of probate dated 29 March 2016 of the last will and testament dated 29 October 2014 obtained by the defendants in Johor Bahru High Court Originating Summons No JA-32NCvC-82–03 of 2016 is properly issued;

I

(d) an order that the Registrar of the High Court do return the original grant of probate dated 29 March 2016 to the defendants for the due administration of the estate;

(e) that the plaintiff do pay the defendants costs of the counterclaim;

(f) that parties are at liberty to apply; and

(g) such further order and/or relief that may be deemed fit and appropriate to this honourable court.

BACKGROUND FACTS

**[3]** The plaintiff, Kevin Peter Schmider at all material times, is a German citizen and the son of one deceased Peter Schmider (NRIC No 540618-86-5039) (German Passport No 32604855) ('the deceased').

**[4]** The first defendant, Nadja Geb Schmider Poignee is a German citizen residing at No 9, Jalan Pendas 5, Leisure Farm Resort, 81560 Gelang Patah, Johor and is the daughter of the deceased.

**[5]** The second defendant, Jessica Karina Schmider is a German citizen resides in Sydney, Australia, working as a cashier and is the daughter of the deceased.

**[6]** The deceased, a permanent resident of Malaysia resided, at all material times, at No 37, Jalan Mawar, Leisure Farm Resort, 81560 Gelang Patah, Johor and died on 30 October 2015 at 10.30pm at Columbia Asia Hospital Nusajaya. The deceased had at the time of his death properties within the jurisdiction.

**[7]** On 4 March 2016, the defendants files an application via Originating Summons No JA-32NCVC-82–03 of 2016 for a grant of probate to be the appointed executrixes of the estate of the deceased according to one last will and testament dated 29 October 2014 ('the 2014 will'), prepared by Rockwills Corp Sdn Bhd.

**[8]** The grant of probate was granted on 29 March 2016 and the defendants were appointed as executrixes of the estate of the deceased ('the grant of probate').

**[9]** On 25 April 2016, Siriwan Chantasukasem ('Siriwan') was contacted by telephone by one Notarial Services Attorney, Jeeraporn Sripetchadanond ('Jeeraporn').

**[10]** The plaintiff's German solicitor, Mrs Thiemann sent a letter to the defendants informing the defendants about the alleged will and they were requested to communicate with the plaintiff's German solicitor.

**[11]** The deceased during his lifetime rented a property known as No 9, Jalan Pendas 5, Leisure Farm Resort, 81560 Gelang Patah, Johor to Dominik Poignee, husband of the first defendant.

**[12]** In the beginning of 2013, plaintiff requested for financial assistance to pay off his debt and went on to say that if the parents did not help the apartment will be auctioned off. The deceased remitted a total of approximately 60,000 Euros to the plaintiff to assist plaintiff to pay off his debt.

**[13]** After remitting 60,000 Euros the deceased told plaintiff that it is enough and requested plaintiff to sell the apartment, settle the debts and send the deceased whatever is left.

**[14]** The plaintiff informed the parents that he required all the money that he gets from selling the apartment to do an MBA at the university and that the parents can debit it from his inheritance.

**[15]** The deceased than said to the plaintiff 'we have lost the apartment' and at least return the 60,000 Euros. The plaintiff replied that it was not possible.

**[16]** The deceased then told the plaintiff that if he does not return the 60,000 Euros that he (the plaintiff) is dead to the parents.

**[17]** In January 2014, the wife of the deceased, Gabriele Brigitte Schmider was diagnosed with cancer and succumbed to cancer on 18 July 2014.

**[18]** On or about 18 May 2015, the deceased was diagnosed with locally advances laryngeal carcinoma (squamos cell) (cancer of throat) and stage IV lung adenocarcinoma (cancer of lung).

**[19]** On 30 October 2015, the deceased succumbed to cancer and passed away.

**[20]** On 9 November 2015, the last will and testament dated 29 October 2014 ('the 2014 will') was read at the office of M/s Reginald Vallipuram & Co.

THE PLAINTIFF'S CASE

**[21]** The plaintiff, Kevin Peter Schmider at all material times, is a German citizen individual and the son of the deceased.

**[22]** The basis of plaintiff's claims and prayers are the deceased had made the

second will on 18 August 2015 ('the Thai will'), naming the plaintiff as an executor of the deceased's estate and further to the following:

(a) that there is a revocation clause whereby the deceased revoked the previous wills with regards to his estate;

(b) that the plaintiff be appointed as the executor and the trustee of the second will (Thai will);

(c) that moneys in the deceased bank account(s) are given to the plaintiff;

(d) that moneys from all of the deceased's insurance policies are given to the plaintiff;

(e) that in the event that the nomination(s) made by the deceased in his Employees Provident Fund (EPF) do(es) not take effect, the benefits of the nomination(s) is given to the plaintiff;

(f) that the property known as No 9, Jalan Pendas 5, Leisure Farm Resort, 81560 Gelang Patah, Johor is given to the plaintiff;

(g) that the property known as No 37, Jalan Mawar, Leisure Farm Resort, 81560 Gelang Patah, Johor is given to the plaintiff;

(h) that shares held by the deceased in Tamawira Enterprise Sdn Bhd (Company Registration No 287681-H) located at 28, Jalan Mega 1/7, Taman Perindustrian Nusa Cemerlang, 79200 Nusajaya, Johor is given to the plaintiff;

(i) that the plaintiff, as trustee, shall hold the rest of the deceased's estate on trust to retain and sell it and:

  (i) to pay debts to discharge any charge or lien on all of the deceased's immovable properties, funeral and executorship expenses;

  (ii) to engage the lawyer, who has notarially certified the second will (Thai will), to assist with the selling of the properties known as No 9, Jalan Pendas 5, Leisure Farm Resort, 81560 Gelang Patah, Johor and No 37, Jalan Mawar, Leisure Farm Resort, 81560 Gelang Patah, Johor and that the lawyer will receive five percent of the total monetary income earned through the sale of the two properties for his assistance; and

  (iii) to hand over 150,000 US Dollar ($) out of the deceased's residuary estate to Siriwan, 15,000 US Dollar ($) to Renate Schmider and 15,000 US Dollar ($) to Elvira Brückner; and

(j) that the deceased is aware that he is not leaving anything under the second will (Thai will) to the defendants but wished that first defendant pays 1,500 US Dollar ($) every month to second defendant.

**A** **[23]** Being the only son of the deceased, the plaintiff, at all material times believes that the deceased made the second will dated 18 August 2015 for the plaintiff to continue his legacy, including but not limited to manage Tamawira Enterprise Sdn Bhd.

**B** **[24]** The plaintiff believes that as part of the estate, the shares in Tamawira Enterpirse Sdn Bhd were transferred under suspicious circumstances, due to the fact that it was made two days before the death of the deceased ie on 30 October 2015.

**C** **[25]** The fact that the plaintiff continuing his study in MBA and being supported by the deceased shows that the deceased intended the plaitniff to continue his legacy.

**D** **[26]** Further, the basis of the plaintiff's claim is the plaintiff was never involved and has no knowledge of the making of the second will (Thai will) until been made known by one Jeeraporn of the existence of the second will (Thai will) on 25 April 2016.

**E** THE DEFENDANTS' CASE

**[27]** The first defendant, Nadja Geb Schmider Poignee is a German citizen individual residing in Malaysia with her address for service at No 9, Jalan Pendas 5, Leisura Farm Resort, 81560 Gelang Patah, Johor and the daughter of **F** the deceased.

**[28]** The second defendant, Jessica Karina Schmider is a German citizen, a cashier by occupation and resides at 38/1–9, Warburton Street, Gymea, Sydney, NSW Australia and also the daughter of the deceased (both first **G** defendant and second defendant collectively referred to as 'the defendants').

**[29]** The deceased once resided at No 37, Jalan Mawar, Leisure Farm Resort, 81560 Gelang Patah, Johor and died on 30 October 2015 at 10.30pm and had **H** at the time of his death properties within the jurisdiction.

**[30]** On 4 March 2016, the defendants filed an application via Originating Summons No JA-32NCVC-82–03 of 2016 for a grant of probate to be the appointed executrixes of the estate of the deceased according to the 2014 will.

**I** **[31]** That the deceased appointed both defendants as joint executors in his 2014 will.

**[32]** That the deceased also devised the immovable properties registered in

his name known as No 9, Jalan Pendas 5, Leisure Farm Resort, 81560 Gelang Patah, Johor and No 37, Jalan Mawar, Leisure Farm Resort, 81560 Gelang Patah, Johor his residuary estate to both defendants in equal shares.

**[33]** That the deceased specifically stated in the 2014 will that the deceased is not leaving anything for his son the plaintiff.

**[34]** That the plaintiff was disinherited for the following reasons:

(a) the deceased had between 15–25 April 2011 transferred to plaintiff a total sum of 228,000 Euros for the purchase of an apartment in Germany for family use to be bought in the name of the plaintiff and on 24 March 2011 the deceased had transferred a sum of 7,354 Euros to the property agent;

(b) in the beginning of 2013 plaintiff requested for financial assistance to pay off his debts and went on to say that if the parents did not help the apartment will be auctioned off. The deceased remitted a total of approximately 60,000 Euros to the plaintiff to assist plaintiff to pay off his debts;

(c) after remitting 60,000 Euros the deceased said that it is enough and requested plaintiff to sell the apartment, settle the debts and send the deceased whatever is left;

(d) the plaintiff informed the parents that he required all the money that he gets from selling the apartment to do an MBA at the university and that the parents can debit it from his inheritance;

(e) the deceased then said to plaintiff 'we have lost the apartment' and at least return the 60,000 Euros. The plaintiff replied that it was not possible;

(f) the deceased then told the plaintiff that if he does not return the 60,000 euros that he (the plaintiff) is dead to the parents. The parents decided to disinherit the plaintiff;

(g) in January 2014 the wife of the deceased was diagnosed with cancer and succumbed to cancer on 18 July 2014. The deceased held it against the plaintiff for his inability to send his wife for treatment to United States of America; and

(h) the deceased recalled the 2009 will that he had made with Rockwills Corp Sdn Bhd and made a new will dated 29 October 2014 (the 2014 will) disinheriting the plaintiff and making defendants the sole beneficiaries of his estate.

**[35]** The allegations that the deceased visited Jarrett Llyod in January 2015 and handed a copy of the 2014 will to Jeeraporn and requested her to prepare

a new will is not true, inter alia, for the following reasons:

(a) the deceased did not go to Thailand in January 2015;

(b) there was no reason whatsoecer for the deceased who disinherited the plaintiff pursuant to a joint decision made with his wife to disinherit the plaintiff to change his mind three months later and leave everything to the plaintiff, his son;

(c) Jarrett Llyod contrary to proper legal practice do not have the following:

(i) a retainer or warrant to act from the deceased;

(ii) a record or minutes of the alleged meeting in January 2015 held in the office of Jarrett Llyod; and

(iii) receipt for payment of the sum of THB35,000 allegedly paid for fees to draft the Will and THB5,000 for maintaining document.

**[36]** The allegation that the deceased signed a will dated 18 August 2015 (Thai will) at Novotel Hua Hin Cha Am Beach Resort & Spa, Thailand on 18 August 2015 is not true for the following reasons:

(a) that the deceased had not seen or approved a draft of the alleged will;

(b) Jeeraporn could not have known that the deceased will be at Novotel Hua Hin Cha Am Beach Resort & Spa, Thailand on 18 August 2015 as there was no communication between deceased and Jeeraporn since the alleged visit on January 2015;

(c) on 18 August 2015 the date the alleged will was made the only manner which the deceased could respond is through a combination of non verbal gestures and voicing via tracheostomy tube. The voicing via tracheostomy tube was soft and restricted to a few words. Communication was difficult. Some degree of familiarity and proximity was necessary to understand what the deceased was saying. There was no way in which Jeeraporn could have ascertained whether the deceased knew and understood the alleged will. Additionally it is an admitted fact that no doctor was present although deceased was critically ill as he was suffering locally advanced laryngeal carcinoma (squamous cell) (cancer of throat) and stage IV lung adenocarcinoma (cancer of lung) fourth stage and died two months later;

(d) the lady companion of the deceased Siriwan who was with him 24 hours of the day as the deceased needed assistance around the clock with the daily living activities as he was in a wheelchair and she had to monitor the gauge cuffed tube around him to help him in his breathing (for purpose of cleaning, adjustment and replacement whenever necessary and to ensure that food does not go into the lungs when swallowing) and her sister who stayed in the same suite to assist in taking care of the deceased

categorically deny Jeeraporn came to the hotel on 18 August 2015 and deny that the deceased made a will on this trip; A

(e) that Jeeraporn stood to gain a substantial financial benefit under the alleged will;

(f) that both witnesses were strangers to the deceased; and B

(g) that the deceased did not inform anyone of the existence of the alleged will nor did he have a copy of the will.

**[37]** The plaintiff's prayer for the transfer of shares made by the deceased in favour of the defendants be set aside is outside the ambit of this probate action that is brought pursuant to O 72 r 2 of the Rules of Court 2012. C

**[38]** In any event the transfer of shares is an *inter vivos* gifts and does not form a part of the estate of the deceased for the following reasons: D

(a) sometime in May 2015 when diagnosed with advanced cancer the deceased decided to resign as a director and transfer his shares to the defendants pursuant to which all statutory forms, statutory declarations and other relevant documents were signed in escrow by the deceased, the defendants and the other shareholder, Neff Wolfgang Hermann and deposited with RHV Vision Management Sdn Bhd, company secretary in June, 2015 pending further instructions from the deceased; E

(b) on 27 October 2015 the deceased requested Madam Chia Moon Kion, Financial Controller of Tamawira Enterprise Sdn Bhd to see him at home and instructed her to proceed with the stamping and transfer of the shares to the defendants and his resignation as a director; F

(c) on 28 October 2015 Madam Chia Moon Kion instructed the company secretary to date and submit the documents to Companies Commission of Malaysia ('SSM'); and G

(d) all documents were dates 28 October 2015 duly stamped and submitted to SSM.

THE LAW H

**[39]** Section 5 of the Wills Act 1959 reads as follows:

5 Mode of execution

(1) No will shall be valid unless it is in writing and executed in manner hereinafter mentioned. I

(2) Every will shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; such signature shall be made or acknowledged by the testator as the signature to his will in the presence of two or

more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary:

> Provided that every will shall, as far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid under this section if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and no such will shall be affected by the circumstance —
>
> (a) that the signature shall not follow or be immediately after the foot or end of the will;
>
> (b) that a blank space shall intervene between the concluding word of the will and the signature;
>
> (c) that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses;
>
> (d) that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature; or
>
> (e) that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature,
>
> and the enumeration of the above circumstances shall not restrict the generality of this proviso; but no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.

**[40]** The legal principles in verifying a will has been adopted and decided by the Federal Court in the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 at p 12 where the Federal Court held as follows:

> [19] As regards the burden of proof, the Court of Appeal quite rightly stated the settled law, ie that where the validity of a will was challenged, the burden of proving testamentary capacity and due execution lay on the propounder of the will as well as dispelling any suspicious circumstances surrounding the making of the will; that the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay with those who challenged the will. In this connection, we find the approach taken by the High Court of Australia in *Willian Henry Bailey & Ors v Charles Lindsay Bailey & Ors* (1924) 34 CLR 558 to be instructive. Therein Isaacs J said, inter alia:

(1) The onus of proving that an instrument is the will of the alleged testator lies on the party propounding it; if this is not discharged, the court is bound to pronounce against the instrument.

(2) This onus means the burden of establishing the issue. It continues during the whole case and must be determined upon the balance of the whole evidence.

(3) The proponent's duty is, in the first place, discharged by establishing a prima facie case.

(4) A prima facie case is one which, having regard to the circumstances so far established by the proponent's testimony, satisfies the court judicially that the will propounded is the last will of a free and capable testator.

(5) A man may freely make his testament, how old soever he may be; for it is not the intergrity of the body, but of the mind, that is requisite in testaments.

(6) The quantum of evidence sufficient to establish a testamentary paper must always depend upon the circumstance of each case, because the degree of vigilance to be exercised by the court varies with the circumstances.

(7) As instances of such material circumstances may be mentioned: (a) the nature of the will itself regarded from the point of simplicity or complexity, or of its rational or iirational provisions, its exclusion or non-exclusion of beneficiaries; (b) the exclusion of persons naturally having a claim upon the testator, (c) extreme age, sickness, the fact of the drawer of the will or any person having motive and opportunity and exercising undue influence taking a substantial benefit.

(8) Once the proponent establishes a prima facie case of sound mind, memory and understanding with reference to the particular will, for capacity may be either absolute or relative, then the *onus probandi* lies upon the party impeaching the will to show that it ought not to be admitted to proof.

(9) To displace a prima facie case of capacity and due execution, mere proof of serious illness is not sufficient : there must be clear evidence that undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing his property.

(10) The opinion of witnesses as to the testamentary capacity of an alleged testator is usually for various reasons of little weight on the direct issue.

(11) While, for instance, the opinions of the attesting witnesses that the testator was competent are not without some weight, the court must judge from the facts they state and not from their opinions.

**[41]** The above pronouncement of law has been followed by the Court of Appeal in the case of *Ong Cheng Guan (menyaman bagi pihak dirinya dan bagi pihak benefisiari-benefisiari kepada mendiang Ong Eng Bee) & Anor v Ong Eng Hock & Anor* [2016] MLJU 1703; [2016] MLRAU 1 at p 2 where it was held

A that:

PRELIMINARY JURISPRUDENCE ON THE WILL

[4] It is trite that when a person alleges forgery, the burden of proof is on him. However, the jurisprudence relating to the will is slighty different. We will explain
B this further.

[5] When a person challenges the will, the court as a matter of practice will first invite the defendants who are the proppounder of the will to prove:

(a) there was due execution of the will; and

C (b) dispel any suspicious circumstances surrounding the making of the will.

Once the court is satisfied with the evidence adduced to all the related issues, then only it becomes incumbent upon the plaintiff who challenges the will to prove extraneous vitiating element such as undue influence, fraud or forgery, etc support for the proposition is found in a number of cases and to name a few are as follows:

D

(i) *Khaw Cheng Poon & Ors v Khaw Cheng Bok & Ors and another appeal* [2005] 6 MLJ 540;

(ii) *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 (CA); *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (FC).
E

**[42]** Further, the Court of Appeal in the case of *Kek Siong Uteh v Aw Siew Keon* [2016] 4 MLJ 356 at p 367; [2017] 3 MLRA 23 at p 33 through the speaking judgment of Nallini Pathmanathan JCA (now FCJ) held that:

F

*The law on wills*

[48] The Federal Court in the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 stated that the burden of proof of testamentary capacity and due execution lies on the propounder of the will, while the burden of
G proof of extraneous vitiating element lies on the challenger of the will. In that case, Steve Shim CJ (Sabah and Sarawak) stated as follows:

> As regards the burden of proof, the Court of Appeal quite rightly stated the settled law, ie, that where the validity of a will was challenged, the burden of proving testamentary capacity and due execution lay on the propounder of the
H will as well as dispelling any suspicious circumstances surrounding the making of the will; that the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay with those who challenged the will.

[49] The Court of Appeal in the case of *Tho Yow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ 97 considered three authorities on testamentary capacity. The first
I was the Privy Council case of *Judah v Isolyne Bose* AIR 1945 PC 174, the second was *Williams on Wills* (7th Ed) and finally the third was *Theobald on Wills* (15th Ed) Gopal Sri Ram JCA held as follows:

> It is clear from the foregoing passages, in particular from the passages in *Theobald on Wills* that suspicious circumstance in the context of wills relate to

> circumstances surrounding the making of the will, not circumstances surrounding the testamentary capacity of the testator. In other words if the propounder of a will wishes to succeed in obtaining probate, he must upon challenge being taken establish: (a) testamentary capacity; and (b) dispel any suspicious circumstances surrounding the making of the will.
>
> [50] From the above authorities, it may be concluded that in this case, the appellant bears the burden to prove the testamentary capacity of the deceased and the due execution of the second will. The appellant should also dispel any suspicious circumstance surrounding the making of the second will. On the other hand, the respondent bears the burden of proving any extraneous vitiating elements to defeat the second will.

**[43]** Based on the above authorities, it is clear that since the second will is being challenged, the burden is on the plaintiff to prove testamentary capacity of the deceased and due execution of the second will on 18 August 2015 and there were no suspicious circumstances surrounding the making of the will.

ISSUES TO BE TRIED

**[44]** The issues to be tried are as follows:

(a) whether the will dated 18 August 2015 (Thai will) of Peter Schmider, deceased allegedly made on 18 August 2015 at Novotel Hua Hin Cha Am Beah Resort & Spa, Thailand is valid under the Wills Act 1959;

(b) whether the deceased had the testamentary capacity to execute the alleged will dated 18 August 2015 (Thai will); and

(c) whether the deceased knew and approved the contents of the alleged will dated 18 August 2015 (Thai will).

THE TRIAL

**[45]** Trial of the suit took place on 28 October 2018 and 29 October 2018, eight witnesses testified. The plaintiff called two witnesses :

(a) Kevin Peter Schmider (PW1); and

(b) Azri Nadiah bt Mohd Yani (PW2).

**[46]** The defendants called six witnesses:

(a) Chia Moon Kion (DW1);

(b) Siriwan Chantasukasem (DW2);

(c) Jessica Karina Schmider (DW3);

(d) Dominik Poignee (DW4);

(e) Nadja Geb Schmider Poignee (DW5); and

(f) Mrs Pairoh Chantasukasem (DW6).

FINDINGS OF THIS COURT

**[47]** Having fully and carefully considered the plaintiff's as well as the defendants' case and the issues realised in the written submissions, I decided to dismiss the claim by the plaintiff and allow the defendants' counterclaim. This is my judgment setting out the full reasons for my decision.

WHETHER THE DECEASED HAD TESTAMENTARY CAPACITY AT THE TIME WHEN HE MADE THE SECOND WILL (THAI WILL)

**[48]** Based on the facts of the case and the plaintiff's testimony and the documents tendered in court, it is evident that the deceased has no capacity to make the second will (Thai will).

**[49]** From the evidence of plaintiff (PW1) in examination-in-chief, the plaintiff admitted the purported second will (Thai will) is the last will of the deceased and he is the beneficiary of the will together with Siriwan and his two aunts. The first defendant is to pay the second defendant a monthly sum of USD1,500. The Thai will is drafted in Thailand and the plaintiff has only seen a scanned copy of the purported second will (Thai will).

**[50]** The plaintiff further admitted that he came to know of the purported second will (Thai will) approximately six months after the deceased had passed away that is on 26 April 2016 when Jeeraporn allegedly sent him an e-mail and he did not know of the existence of the purported second will (Thai will) prior thereto.

**[51]** The evidence of the plaintiff clearly shows that he had no knowledge of what took place on 18 August 2015 when the purported second will (Thai will) was made by the deceased. Therefore, I find the plaintiff himself is not in a position to discharge the burden that rested on him to prove testamentary capacity of the deceased and the due execution of the purported second will (Thai will) on 18 August 2015.

**[52]** I also find the evidence of Azri Nadiah bt Mohd Yani (PW2) is of little assistance to the plaintiff's case. She was with the firm of Tetuan Rahayu Partnership for one year 11 months and joined the firm sometime in October 2016, approximately more than one year two months after the purported second will (Thai will) was alleged to have been executed.

**[53]** Based on the evidence given by the plaintiff and PW2, I am of the view that the plaintiff and PW2 had no knowledge of what took place on 18 August 2015.

**[54]** I am of the considered view that the evidence of Jeeraporn, Jaruma Waramorn and Chanin Kulkanjantorn could have shed some light to the plaintiff's case but unfortunately they were not called to testify in court.

**[55]** To me, all three are important witnesses.

(a) Jeeraporn is the person who alledgedly prepared the purported second will (Thai will);

(b) Jaruma Waramorn ('Jaruma') is the person who allegedly witnesses the purported second will (Thai will); and

(c) Chanin Kulkanjantorn ('Chanin') is the person who allegedly witnessed the second will (Thai will).

Their testimonies in court could have explained on what transpires on 18 August 2015. Neither the plaitniff nor PW2 explained to the court the reasons for their non-attendance.

**[56]** Therefore, I am of the considered opinion that the failure of Jeeraporn (maker of the purported second will (Thai will)) and the failure of Jaruma and Chanin (alleged witnesses to the purported second will (Thai will) to testify at the trial is fatal to the plaintiff's case as there is no evidence before the court on the testamentary capacity of the deceased and due execution of the purported second will (Thai will) on 18 August 2015.

**[57]** The Court of Appeal in the case of *Tho Yow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ 97 at p 102; [2002] 2 MLRA 213 at p 216, through the speaking judgment of Gopal Sri Ram JCA (as he then was) held that:

> The third authority which we will refer to is *Theobald on Wills* (15th Ed) at p 31 under the heading 'Test of testamentary capacity':
>
> In order to have testamentary capacity a testator must understand:
>
> (a) the effect of his wishes being carried out at his death, though it is not necessary that he should view his will with the eye of a lawyer and comprehend its provisions in their legal form;
>
> (b) the extent of the property of which he is disposing; and
>
> (c) the nature of the claims on him. The testator must have 'a memory to recall the several persons who may be fitting objects of the testator's bounty, and an understanding to comprehend their relationship to

himself and their claims upon him' so that he can decide whether or not to give each of them any part of his property by his will.

The same test applies whether the testator has been subnormal from birth or has suffered impairment of the mind during his lifetime, whether through injury, physical or mental illness, senility or addiction.

**[58]** Further, the Court of Appeal in the case of *Khaw Cheng Poon & Ors v Khaw Cheng Bok & Ors and another appeal* [2005] 6 MLJ 540 at pp 546–547; [2004] 2 MLRA 687 at p 690, through the speaking judgment of Gopal Sri Ram JCA (as he then was) held that:

The conclusion I draw from these authorities (*Davis v Mavhew* [1927] P 264; *Low v Guthrie* [1909] AC 278) to which I have referred is that, when it is a question of knowledge and approval of the contents of a will the circumstances which are held to excite the suspicions of the court must be circumstances attending, or at least relevant to, the preparation and execution of the will itself. ...

THE SECOND ISSUE: THE 1992 WILLS

The learned judge's finding in respect of the 1992 Wills was that they were the product of fraud and undue influence. He further held that there were suspicious circumstances surrounding the making of the 1992 Wills which were not dispelled by the appellants in the frist appeal. We find it unnecessary to reproduce all those passages in which the learned judge considered the issue at hand. Two matters are quite clear, as pointed out by Datuk N Chandran, common counsel for the respondents in this appeal, the 1992 Wills failed the test of formal validity and it was really unnecessary for the learned judge to have continued with the other issues.

There can be no dispute on the proved and admitted facts, that the witness Dr Gafoor (PW2) witnessed the wills in his clinic in the absence of the deceased. This plainly does not meet the requirement of s 5 of the Wills Act 1959.

**[59]** Based on the above authorities, it is clear that in the absence of Jeeraporn and the two witnesses there is no evidence produced before the court on the testamentary capacity of the deceased on 18 August 2015. There is no one to satisfy the court that the deceased knew and approved the content of the purported second will (Thai will) on 18 August 2015.

**[60]** Further, I find that medical evidence produced in court shows that the deceased can only respond to question using a combination of non-verbal gestures and voicing via tracheostomy tube which requires the assistance of Siriwan.

**[61]** Dr Akhil Chopra MD Senior Consultant in Oncology, John Hopkins Medicine, Singapore in his medical report states that:

He told me on 20th August, that he had just returned from a short holiday and felt more refreshed and rejuvenated. He seemed to have normal cognition at this time

and was oriented to time place and person. He responded appropriately to my questions using a combination of non- verbal gestures and voicing via tracheostomy tube. He used to use a wheelchair due to long wait in clinic and chemotherapy suite, but was able to ambulate to use the bathroom.

(See pp 1–2 *ikatan dokumen plaintiff* (bundle A))

**[62]** The evidence of Siriwan in his witness statement (DWS2) shows that the deceased can only say words in a hoarse voice and only Siriwan and her family members who are familiar with the words together with verbal gestures can make out what the deceased is saying.

(Witness statement of Siriwan Chatasukasem DWS2)

39. Q : According to Plaintiff, Jeeraporn and 2 other Thai persons came to Novotel Hotel on 18/8/2015 and Peter Schmider signed his last Will?

A : That is a total lie, I was with Peter Schimider throughout the day, Peter Schimider had no visitors.

40. Q : When did you get to know about this alleged Will?

A : On 25/4/2016 I received a call when I was working. I could not talk. I returned the call. One Jeeraporn introduced herself to me as a Notary Lawyer. She went on to say that Peter Schimider made a Will when on holiday with me. She said Kevin's (Plaintiff) name is mentioned. Also my name only cash. She said that she wants to send the document to Kevin and asked for his phone number.

41. Q : What was your response?

A : I said 'How it happens'. Because I always with him. I told them if they want to do something false please don't do.

...

47. Q : In your opinion was Peter Schimider in a position to read and understand this Will on 18/8/2015.

A : No.

48. Q : Was Peter Schimider in a position to talk on 18/8/2015?

A : Peter Schimider can only talk when I am around.

49. Q : Why do you say that?

A : To enable Peter Schimider to talk I have to see whether he can breathe though his nose. If he can then I can close the opening in the tube with a cap that I keep. Peter Schimider can only say a couple of words at a time. There are times when Peter Schimider can say words in a hoarse voice. I and the family members who are familiar with the words he says together with verbal gestures from Peter Schimider can make out what he is saying.

**[63]** The plaintiff (PW1) in his evidence in cross-examination had stated as follows:

(see pp 52–53 of the notes of evidence)

RV : Alright. Now when you saw him, dad had a gauge cuff tube around his throat right?

KEVIN : Yes.

RV : This tube was inserted on 06.06.2015. It's in record anyway lah. It's in the medical reports, right.

KEVIN : Yes, sir.

RV : So he had problem speaking, right?

KEVIN : Yes, sir.

RV: He could only speak short sentences, right?

KEVIN: Yes, sir.

RV : Short sentences and in a hoarse voice.

KEVIN : Yes, sir.

RV : And you can understand him with the help of the non-verbal gestures he makes.

KEVIN : Yes, sir and ... yes sir.

RV : Is that correct?

KEVIN : Yes, sir.

RV : Yes. So now that was ... in June he was already having this, in was in that position vis a vis his ability to talk, right?

KEVIN : He had his better moment and his —

RV : Sorry?

KEVIN : He had better moments and he had worse moments.

RV : Yes, when he's able to breathe on his own, then he can talk better.

KEVIN : Yes, sir.

**[64]** Based on the above, I am of the view that the medical condition of the deceased ie he was suffering from throat cancer as well as lung cancer fourth stage, there was doubt whether the deceased could have read the will nor was there any way in which Jeeraporn could have communicated the content of the purported second will (Thai will) to the deceased to ensure that the deceased knows and approve the contents of the said purported will.

**[65]** Therefore, I hold that the plaintiff had failed to discharge the burden that rested on him of proving that the deceased had knowledge and approve the content of the purported second will (Thai will).

WHETHER THERE WAS DUE EXECUTION OF THE SECOND WILL (THAI WILL)

**[66]** Based on the evidence presented before the court I find that the plaintiff had failed to produce evidence to show that there was due execution of the second will (Thai will). Jeeraporn, Jaruma and Chonin, the three important witnesses (the purported maker of the second will (Thai will) and the two attesting witnesses should have been called to give evidence on the due execution of the purported second will (Thai will) but none of them came to give evidence.

**[67]** In the case of *Dr K Shanmuganathan v Periasamy s/o Sithambaran Pillai* [1993] MLJU 91; [1993] 4 MLRH 95, Peh Swee Chin SCJ said that the propounder is requires to prove the will in solemn form and that it is mandatory for the attesting witnesses to be examined in court.

**[68]** A p 24 (MLJU); p 106 (MLRH) of the report His Lordship said as follows:

> As in this instant case also, whenever a will of a deceased person is disputed by any person whose interest in the estate of the dead person is prejudiced by the will, then in a probate suit at his instance, he may compel the executor of the will to propound the will, *viz* to prove the will in solemn form *viz* to prove the will in an action in open court by the mandatory examination of the attesting witnesses in court if they or the survivor of them is alive. Such an executor may, for his own protection propound the will in solemn form, even when he is not compelled to do so where to obtain the probate of the will in simple form or to prove the will in simple form *viz ex parte* on the basis of affidavits, will be a fruitless exercise in view of a challenge to him.

**[69]** Further at p 39 (MLJU); p 114 (MLRH) His Lordship said

> On Wills Act 1959 as modelled on Britain's Wills Act 1837, s 5 of our Act is in pari material with s 9 of Britain's Act. On the question as contended by both learned counsel in their respective but different ways, the position in England on the question is settled. It is as follows: First, the testator must in both cases, either sign the will, or acknowledge his signature already made on to his will, in the joint presence of the two attesting witnesses; *Betts v Gannel* [9]; *Wyatt v Berry* [10]; Secondly [1993] MLJU 91 at 40 both attesting witnesses must sign their respective names in the presence of the testator, after the testator has just made his signature or acknowledged his signature already made earlier; *Moon v King* [11]; *Brown v Skirrow* [12]. Thirdly it is not essential for both attesting witnesses to sign in the presence of each other, *Faulds v Jackson* [13]; *Brown v Skirrow*. The nett effect is, for

A the purpose of the present case before me, that the two witnesses to the will need not sign simultaneously in the presence of each other and the presence of the testator. It is much more easy to illustrate than explain.

B **[70]** In the case of *Lim Kang Hai & Ors v Lim Chik Lock* [2013] MLJU 614; [2013] MLRHU 1, Abdul Rahman Sebli J (now JCA) said the execution of the will was witnessed by two lawyers. Although one of the lawyers gave evidence the court invoked s 114(g) of the Evidence Act 1950 due to the failure of Han Chin June (the other lawyer who witnessed the will) to testify in court.

C **[71]** At pp 11–12 of the report, His Lordship said that:

> [27] ... The execution of the will was supposedly witnessed by two lawyers, namely DW1 and Ms Han Chin June. DWTs evidence on material matters were seriously challenged in cross examination, in particular his claim that it was Madam Ho's
D instruction that they proceeded with execution of the will on that same day and that the whole content of the will was her own instruction and not the defendant's. Bearing in mind the burden is on the defendant to dispel all suspicious circumstances surrounding the making of the will, it was incumbent on the defendant to call Ms Han Chin June to give evidence. No explanation was given for
E withholding her evidence. This must therefore be held against the defendant by virtue of s 114(g) of the Evidence Act 1950.

**[72]** Further in the case of *Ong Cheng Guan & Anor v Ong Eng Hock & Anor*, the Court of Appeal ruled that the will is not worth the paper it is written on as
F the defendant did not call the witnesses who witnessed the signature of the deceased.

**[73]** The Court of Appeal at p 6 said:

G > [11] The defendants did not call the witnesses who had witnessed the signature of the deceased. Learned counsel for the defendants was candid on this issue and the court is grateful as much judicial time was saved in writing the judgment.
>
> [12] Once the propounder of the will, in this case the defendants, failed to satisfy the burden, then the will is not worth the paper it is written on and the relevant
H parties must apply for letters of administration and distribute the property of the deceased according to law.

**[74]** Based on the above authorities, I am of the considered view that the attendance of the maker of the purported second will (Thai will) and the two
I attesting witnesses is mandatory and the failure of all to attend court renders the purported second will (Thai will) 'not worth the paper it is written on'.

**[75]** On the other hand, I find that the defendants had produced two witnesses; Siriwan (DW2) and Pairoh Chantasukasem (DW6) who were with

the deceased throughout the day on 18 August 2015 and according to both witnesses no one saw the deceased.

**[76]** It is to be noted that Siriwan (DW2) gave evidence to the effect that she was with the deceased round the clock because of deceased's health condition. She and Pairoh (DW6) confirmed that on 18 August 2015 the deceased had no visitors. As far as both witnesses are concerned the deceased did not sign the purported second will (Thai will) on 18 August 2015 (see DWS2 and DWS6's witness statement).

**[77]** Siriwan's (DW2) evidence on the deceased's health condition was not challenged by the plaintiff and she had to take care of the deceased round the clock as he was weak due to chemo and radiation treatment.

(see Siriwan Chantasukasem witness statement (DWS2))

23. Q : Was Peter Schmider able to take care of himself?

A : No, he was weak due to chemo and radiation treatment. He needed someone to take care of him round the clock.

24. Q : Please explain

A Ryles tube was inserted for feeding purpose between 6.6.2015 to 2.8.2015. On 18.5.2015 a tube was placed around his throat to assist him in breathing as he had difficulty breathing through the nose. On 2.6.2015, to help him in his breathing, this was changed to a gauge cuffed tube. The tube required close monitoring and so when Peter Schmider eats have to be slow and in small pieces. I must monitor to see that the food does not leak into the tube and go to his lung. I must clean and or replace the tube whenever necessary. We had to standby oxygen at home. When Peter Schmider cannot breathe properly I have to hook up the oxygen cylinder. I did suction whenever required. I had a mobile oxygen unit whenever we traveled by car. Peter Schmider was using pampers and I had to change the pampers from time to time. He is most of the time in a wheelchair and I had to push the wheelchair when he goes to toilet and I have to assist. I was the one who gave him his medicines and sometimes when necessary pain killers.

**[78]** I find their evidence was unshaken during cross-examination and I see no reason why their evidence should no be believed by this court.

**[79]** Therefore, based on the evidence of DW2 and DW6, I am of the considered view there is a direct evidence to prove that DW2 and DW6 accompanied the deceased on the trip to Thailand and who were with the deceased round the clock on 18 August 2015 that the deceased had no visitors in particular that Jeeraporn and the two witnesses did not visit the deceased on the day and the deceased did not sign the purported second will (Thai will) on 18 August 2015.

**[80]** As their evidence was not challenge, I am of the view that the deceased did not sign the second will (Thai will) on 18 August 2015.

**[81]** The plaintiff is relying on expert report by Dr Michael Franz dated 28 November 2017 (IDP1) (see pp 192–194 *ikatan dokumen plaintiff*), supplementary affidavit of Jeeraporn dated 31 May 2017 (see pp 149–157) and supplementary affidavit of Joruma dated 31 May 2017 (see pp 158–168) both documents are marked as exh IDP2 to assist plaintiff in the dispel of the burden.

**[82]** The defendants objected IDP1 and IDP2 being admitted as an exhibit. The grounds for the defendants' objection to the expert report (IDP1) being converted into exhibit are as follows:

(a) failure of Dr Franz to attend court as witness;

(b) Dr Franz was not present at trial to be cross-examined on the authenticity and the contents of his opinion IDP1;

(c) the expert report has been places in Part C of Bundle A ie both the authenticity and the contents of the expert report are disputed;

(d) there is no evidence before the court that the signatures on the expert report on p 193 of *ikatan dokumen plaintif* bundle A is that of Dr Franz;

(e) IDP1 is to be treated as hearsay as it has not been subjected to cross-examination;

(f) Dr Franz's identity is not known since he has not given his passport number or any other identification in the report;

(g) Dr Franz based his opinion on an examination of unscanned signatures when such an examination can only be carried out with documents bearing original signatures;

(h) nowhere in the report does he say that he has given evidence in court as an expert and that his evidence has been accepted by the court; and

(i) the original expert report was not produced in court. Even if the original was produced it is still not admissible as there is no evidence of the due execution of the original.

**[83]** I cannot agree more with the objections of the defendants that the expert report (IDP1) being converted into exhibits. It is settled law that document marked as 'ID' possessing merely the status of 'identification document', as a general rule, inadmissible in evidence.

**[84]** In the present case, I find that Dr Franz did not attend court and satisfy the court of his qualification and that he has given evidence and his evidence

has been accepted in court. Therefore, this court is not in a position to accept him as an expert and his report (see *Wong Chop Saow v Public Prosecutor* [1965] 1 MLJ 247; *Ch'ng Kheng Phong v Chung Keng Huat & Ors* [2011] 8 MLJ 32).

**[85]** The expert report (IDP1) has been places in Part C of *ikatan dokumen plaintiff* (Bundle A). Therefore, the presence of Dr Franz in court is necessary for him to be cross examined by the defendants on the authenticity and the contents of his opinion in IDP1 (see O 34 r 2 of the Rules of Court 2012; *Tiow Weng Theong v Melawangi Sdn Bhd* [2018] 6 MLJ 761; [2018] 6 MLRA 52). Based on the above, IDP1 ought not to be converted as an exhibit as the maker of IDP1 was not present in court.

**[86]** The defendants also objected IDP2 being converted into an exhibit on the following grounds:

(a) both Jeeraporn and Jaruma were not present at the trial to be cross-examined on the authenticity and the contents of their respective affidavits;

(b) IDP2 is to be treated as hearsay as it has not been subject to cross-examination;

(c) the original affidavits were not produces in court;

(d) there is a non-compliance with O 41 rr 7 and 8 of the Rules of Court 2012 in that both *jurat* is incomplete; and

(e) there is a non-compliance with the practice of Malaysian court which requires the seal of the consulate office to be affixed on the first page of the exhibit that is after the certificate.

**[87]** I agree with the objections taken by the defendants.

**[88]** It is to be noted that IDP2 comprises of two supplementary affidavits of Jeeraporn and Jaruma but both of them were not present at the trial to be cross examined on the authenticity and the contents of their respective affidavits.

**[89]** It is my considered view that affidavits can be used and admitted in court but only if the maker is available in court for cross examination (see *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465; [1997] 2 MLRA 202).

**[90]** The plaintiff's last resort is to rely on s 73(a) of the Evidence Act 1950. However, I find the plaintiff has failed to satisfy the pre-condition of s 73(a) of the Evidence Act 1950.

**[91]** I find neither the plaintiff nor PW2 gave reasons to court why Jeeraporn and Jaruma were not present in court. Both Jeeraporn and Jaruma are important witnesses. No effort was made to bring both of them to court neither was any explanation was given as to why Jeeraporn and Jaruma did not attend court.

**[92]** I rule that since the two affidavits (IDP2) were not strictly proved as required by s 73(a) of the Evidence Act 1950 thereby depriving the defendants the opportunity to test the authenticity of their contents, such exhibits (IDP2) remain inadmissible (see *Soo Hong & Leong Kew Moi & Ors v United Malayan Banking Corp Bhd & Anor* [1997] 1 MLJ 690; [1996] 2 MLRA 547; *RNS Oil and Gas Sdn Bhd v Norhayati binti Ahmad Kamal* [2016] MLJU 934; *Chin Foh Bhd & Anor v Kwan Yun Hong @ Kuan Onn Hing & Ors* [2012] 9 MLJ 854; [2012] MLJU 462).

**[93]** Further, I also agree with the plaintiff's submission that converting IDP2 into an exhibit so that it can assist the plaintiff in the discharge of the burden that rested on the plaintiff would be to run foul or to contravene s 5 of the Wills Act which has been judicially interpreted by the courts to make it mandatory for the attesting witnesses to be present in court and give evidence on the due execution of the purported Thai will.

WHETHER THERE ARE SUSPICIOUS CIRCUMSTANCES SURROUNDING THE MAKING OF THE ALLEGED SECOND WILL (THAI WILL) AND ITS CONTENT

**[94]** The law requires the plaintiff to dispel suspicious circumstances. However, from the evidence presented before the court, I find that the plaintiff has failed to discharge the burden of dispelling suspicious circumstances.

**[95]** The defendants through the evidence of Nadja Geb Schmider Poignee (the first defendant) (DW5) through her witness statement (DWS5) had stated that the alleged second will (Thai will) is highly suspicious and listed out 46 suspicious circumstances in her DWS5 Q : A 113 (i)–(xxxxvi).

**[96]** Upon perusal of the plaintiff's witness statement (PWS1) and contemporeneous documents tendered in court, I find that the plaintiff did not explain away the suspicious circumstances raised by the first defendant (DW5) in her witness statement (DWS5) neither did the plaintiff cross examined the first defendant (DW5) and dispel the suspicious circumstances.

**[97]** It is my finding that failure to do so is fatal to the plaintiff's case and it goes to show that the plaintiff has failed to dispel the burden of dispelling circumstances.

**[98]** Last but not least, I will now deal with the issue of share of the deceased in Tamawira Enterprise Sdn Bhd.

**[99]** I find that the plaintiff is attempting to impugn the transfer of shares from the decesead to the defendants. However the shares are already registered in the name of the two defendants. Therefore, it is my view that they do not form a part of the estate of the deceased and the plaintiff has no locus standi or legal capacity at this juncture to impugn the transfer of shares.

**[100]** Further, it is my considered view that the plaintiff cannot impugn the transfer of shares in this action as the Wolfgang family are not before the court. The Wolfgang family have consented to the transfer of shares from deceased to the defendants. The consent of the Wolfgang family is a prerequisite as this is a private limited company. The consent of the Wolfgang family appears in the director's resolution (D8B) that appears on p 171 of bundle B.

**[101]** To make an order sought by plaintiff in their absence would be a breach of the *audi alteram partem* rule with possible catastrophic consequences as there can be a statement in Tamawira Enterprise Sdn Bhd as the Wolfgang family and the Schmider family each hold 50% shares in the said company.

CONCLUSION

**[102]** On the grounds above stated, I dismiss the plaintiff's claim against the defendants and allow the defendants' counterclaim as set out in para 57 of the statement of defence and counterclaim with costs of RM35,000 subject to payment of an allocator fees.

*Plaintiff's claim dismissed; defendants' counterclaim allowed with costs of RM35,000 subject to payment of an allocator fees.*

Reported by Angela Balan